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In the Supreme Court of the United States

No. 693.

OCTOBER TERM, 1955.

WILLIAM J. KRAUS,
A Taxpayer on Behalf of the City of Cleveland,
Appellant,

vs.

CITY OF CLEVELAND, *et al.*,
Appellees.

APPEAL FROM THE SUPREME COURT OF OHIO.

MOTION TO DISMISS APPEAL
and
BRIEF IN SUPPORT THEREOF.

RALPH S. LOCHER,
Director of Law,
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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-5847

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APPEAL FROM THE SUPREME COURT OF OHIO.

MOTION TO DISMISS APPEAL.

Now comes the appellees herein and move this Court for an order dismissing the appeal filed by appellant, for the reason that it does not present a substantial federal question; that no debatable constitutional question is involved in said cause; and further, that no question arising under the Constitution of the United States is involved in said cause.

RALPH S. LOCHER,
Director of Law,

JOSEPH H. CROWLEY,
Chief Counsel,

WILLIAM T. MCKNIGHT,
Assistant Director of Law,
Attorneys for Appellees.

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APPEAL FROM THE SUPREME COURT OF OHIO.

BRIEF IN SUPPORT OF MOTION TO DISMISS.

STATEMENT OF THE CASE.

The facts presented in appellant's brief are, for the purpose of this motion, admitted to be substantially correct. Together with the Agreed Statement of Facts (appellant's brief page 8) and The Admissions Contained In the Answer (appellee's pleading in court of first instance) (appellant's brief page 7), the gravamen of appellant's position is clearly before this Court.

ARGUMENT.

Appellant here contends that this Court should entertain jurisdiction and re-examine the issues here involved and make a pronouncement contrary to that laid down by the Supreme Courts of the states of California, Oklahoma and Louisiana. An attempt has been made to distinguish the instant case from *DeAryan v. Butler, Mayor, et al.* (Cal.), 260 P. 2d 98, cert. den., 347 U. S.

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1012; *Dowell, et al. v. City of Tulsa, et al.* (Okla.), 273 P. 2d 859, cert. den., 348 U. S. 912; and *Chapman, et al. v. City of Shreveport* (La.), 74 So. 2d 142, dismissed for want of substantial federal question, 348 U. S. 892. For his authority on the position taken, appellant cites *Jacobson v. Massachusetts*, 198 U. S. 11. We shall hereinafter discuss the applicability or inapplicability of each case to the facts at hand.

To substantiate his position that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented, appellant, in his brief at page 19, poses "two simple and fundamental questions" couched in the following language:

> "1. Is the state or local government to have the right to compel the medical treatment of individuals without reference to their consent?
>
> "2. And can the water of a community become the vehicle whereby this newly established function and right of the state or local government to medically treat its citizens is carried out?"

This Court is undoubtedly familiar with all the issues raised and decided in *Jacobson v. Massachusetts, supra*, as well as dictum with reference to collateral matters not essential to its decision. The seventh, eighth and ninth paragraphs of the syllabus, at pages 11-12, read as follows:

> "It is within the police power of a State to enact a compulsory vaccination law, and it is for the legislature, and not for the courts, to determine in the first instance whether vaccination is or is not the best mode for the prevention of smallpox and the protection of the public health.
>
> "There being obvious reasons for such exception, the fact that children, under certain circumstances, are excepted from the operation of the law does not deny the equal protection of the laws to adults if the

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statute is applicable equally to all adults in like condition.

"The highest court of Massachusetts not having held that the compulsory vaccination law of that State establishes the absolute rule that an adult must be vaccinated even if he is not a fit subject at the time or that vaccination would seriously injure his health or cause his death, this court holds that as to an adult residing in the community, and a fit subject of vaccination, the statute is not invalid as in derogation of any of the rights of such person under the Fourteenth Amendment."

The case above cited has stood unchallenged since the court's decision was enunciated in 1905. Its principles are applicable to the instant case and excerpts from the very able opinion written by Mr. Justice Harlan have been repeated many times in cases of this nature. We, therefore, do not hesitate to quote again to this Court from said opinion.

Referring to the text of the case of *Biemeister v. White, President, Etc.*, decided by the Court of Appeals of New York and reported in 72 N. E. 97, which came to this Court on a test of the validity of the statute excluding from the public schools children who had not been vaccinated, this court quoted as follows, at page 34:

"It must be conceded that some laymen, both learned and unlearned, and some physicians of great skill and repute, do not believe that vaccination is a preventive of smallpox. The common belief, however, is that it has a decided tendency to prevent the spread of this fearful disease and to render it less dangerous to those who contract it. While not accepted by all, it is accepted by the mass of the people, as well as by most members of the medical profession. It has been general in our State and in most civilized nations for generations. It is generally accepted in

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theory and generally applied in practice, both by the voluntary action of the people and in obedience to the command of law. Nearly every State of the Union has statutes to encourage, or directly or indirectly to require, vaccination, and this is true of most nations of Europe * * *.

"A common belief, like common knowledge, does not require evidence to establish its existence, but may be acted upon without proof by the legislature and the courts * * *.

"The fact that the belief is not universal is not controlling, for there is scarcely any belief that is accepted by everyone. The possibility that the belief may be wrong, and that science may yet show it to be wrong, is not conclusive; for the legislature has the right to pass laws which, according to the common belief of the people, are adopted to prevent the spread of contagious diseases. In a free country, where the government is by the people, through their chosen representatives, practical legislation admits of no other standard of action; for what the people believe is for the common welfare must be accepted as tending to promote the common welfare, whether it does in fact or not. Any other basis would conflict with the spirit of the Constitution, and would sanction measures opposed to a republican form of government. While we do not decide and cannot decide that vaccination is a preventive of smallpox, we take judicial notice of the fact that this is the common belief of the people of the State, and with this fact as a foundation we hold that the statute in question is a health law, enacted in a reasonable and proper exercise of the police power. 72 N. E. Rep. 97."

Since appellant has in his brief cited the *Jacobson* case as laying down the "ground rules governing the extent to which and the limited instances whereby the state could, through the exercise of its police power, curtail the rights

of free people in our free society," it would seem that the case is directly in support of the position taken by the City of Cleveland in legislating through its Council that the addition of fluorides to the public water supply is a health measure and that such action is clearly within the confines established. The question involved is not whether all or most of the citizens are or have been convinced that the beneficial effects of fluoridation of the public water supply is or is not to their liking, but rather, whether or not upon the evidence presented, the Cleveland City Council acted within its constitutional authority in passing legislation permitting its use.

Appellant, in his brief, at page 21 says:

> "Unfortunately, none of these three cases (referring to DeAyran v. Butler, Dowell v. City of Tulsa and Chapman v. City of Shreveport, supra) has presented all of the fundamental Federal questions in their full scope."

Referring to the *DeAryan* case, appellant says that the questions of violation of religious freedom, infringement of parental rights, and freedom from medical experimentation were not presented. Further, he says that in the *Dowell* case, the question of parental rights and medical experimentation were not advanced or urged and that in the *Chapman* case, the issues of experimentation, parental rights and freedom of religion were not properly considered by the court. With respect to all of these claims, appellees disagree and state categorically that appellant has overlooked the most salient features of each case.

In *DeAryan v. Butler, supra,* at page 103, the court spoke as follows:

> "The United States Supreme Court, in establishing and clarifying the Constitutional right of religious and other freedoms, has distinguished between the direct

compulsions imposed upon individuals, with penalties for violations, and those which are indirect or reasonably incidental to a furnished service or facility. Hamilton v. Regents of University of California, 293 U. S. 245, 55 S. Ct. 197, 79 L. Ed. 343; West Virginia State Board of Education v. Barnette, 319 U. S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628; Cantwell v. State of Connecticut, 310 U. S. 296, 303, 60 S. Ct. 900, 84 L. Ed. 1213."

The evidence adduced at the trial of this cause, in the court of first instance, bears directly on the proposition heretofore stated, namely: That the ordinance had no intendment that any person should be required to use the water furnished by the city for drinking purposes, if, for any reason, he objected to its contents. Had the ordinance so provided and the state upheld such contention, there might have been some validity to appellant's argument that "forced medication" was being imposed upon persons whose religious beliefs and principles were in opposition to the same. Appellant and others so disposed may purchase for themselves, from whatever source they choose, the kind of water they wish to drink if, because of religious beliefs, they are convinced that "fluoridated" water is a medication.

There seems to be no constitutional grounds upon which appellant bases his objection to fluoridation of the water supply as an infringement of parental rights. It is well settled that the law recognizes no absolute right of the parent to determine in all matters how his child shall be reared. This Court can take judicial notice of the breadth and scope of the laws conferring upon Juvenile Courts power to supervise, in one way or another, the activities of minor children. So it is with Child Labor Laws, compulsory school attendance, curfew laws and many others too numerous to set forth herein. When the

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court speaks of the right to preserve order and protect the health of the people under its police power, it does so with respect to persons of all ages.

Whether or not the issue of interference with parental control was stressed, it was disposed of in the all inclusive language used at page 145 in *Chapman v. City of Shreveport, supra,* where the court said:

> "The health of the children of a community is of vital interest and of great importance to all the inhabitants of the community. Their health and physical well-being is of great concern to all the people, and any legislation to retard or reduce disease in their midst cannot and should not be opposed on the ground that it has no reasonable relation to the general health and welfare. Children of today are adult citizens of tomorrow, upon whose shoulders will fall the responsibilities and duties of maintaining our government and society. Any legislation, therefore, which will better equip them, by retarding or reducing the prevalence of disease, is of great importance and beneficial to all citizens. In our opinion the legislation does bear a reasonable relation to public health."

That case was dismissed by this Court for want of substantial federal question. 348 U. S. 892.

Appellant's contention that the matter of "parental rights" was overlooked and neglected by this Court in considering the issues in the *Chapman* case fails when viewed in the light of Rule 40, 1(d)(1) that "the statement of a question presented will be deemed to include every subsidiary question fairly comprised therein." In speaking of "the health of the children of a community," Judge Hawthorne of the Supreme Court of Louisiana was certainly mindful of the fact that the benefits accruing to children of tender age were such as could properly be legislated, irrespective of the wishes of their parents. This

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Court undoubtedly read that language before it dismissed the appeal.

Referring to *Dowell v. City of Tulsa, supra*, appellant, at page 21 of his brief, says:

> "While the questions of individual liberty and religious freedom were sketchily presented, the questions of parental rights and medical experimentation were not advanced or urged."

We here call the attention of the Court to the second syllabus of the opinion of the Oklahoma Supreme Court at page 860, which reads as follows:

> "2. To the extent that such power is delegated to it under this State's constitution and statutes, a municipality may by proper ordinance provide for the fluoridation of its water supply without contravening the First and the Fourteenth Amendments of the U. S. Constitution."

And further, at page 864 the court says:

> "Plaintiffs do not elaborate on their contention that Ordinance 6565 is in violation of the 'free exercise' of religion, which, in the First Amendment of the United States Constitution, Congress is forbidden to prohibit, but we assume this is based on the hypothesis that the fluoridation prescribed in the Ordinance is a form of 'medication' or 'medical treatment' forbidden by the tenets of one or more well-known churches or religious sects. This argument is closely allied to one phase of the plaintiffs' 'Proposition 4' to the effect that fluoridation is treatment of a disease and therefore that the Ordinance constitutes the unlicensed practice of medicine as defined and forbidden in Title 59 O. S. 1951 §§ 495b and 497. To what was said concerning a similar argument in DeAryan v. Butler, supra, which we hereby approve and adopt, we wish to add our opinion that in the contemplated water fluoridation, the City of Tulsa is no more prac-

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ticing medicine or dentistry or manufacturing, preparing, compounding or selling a drug, than a mother would be who furnishes her children a well-balanced diet, including foods containing vitamin D and calcium to harden bones and prevent rickets, or lean meat and milk to prevent pellagra. No one would contend that this is practicing medicine or administering drugs. This conclusion also disposes of the contention that the Ordinance constitutes a violation of Title 59 O. S. 1951 §§ 273 and 333, wherein plaintiffs employ what a California Judge is said to have termed an 'over-refinement' in the application of definitions to facts."

A careful study of the three cases cited, and from which excerpts have been quoted, refute the four points raised in appellant's brief and his contention that they have not been answered by this Court, namely, that the ordinance in question is violative of the constitutional guarantees contained in the First and Fourteenth Amendments to the Constitution, in that it—the ordinance—violates: 1. Religious Freedom; 2. Parental Control; 3. Forced Medication; and 4. Experimentation With the Human Body. Each of these points was raised in some fashion in one or more of the three cases which this Court has seen fit to refuse to hear on the grounds that no substantial federal question had been raised.

Appellant has included in his brief reference to six Law Review Articles, all of which have been read and carefully considered by appellee. It is submitted that the writer of each article merely poses questions which have been raised in his mind as a result of his study, but in no one of said articles is a case made or suggested that local legislation permitting the fluoridation of public water supplies is violative of constitutional rights and liberties. To quote from one of these articles entitled "Municipal Corporations—Constitutional Law—Validity of Fluorida-

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tion of Public Water Supply," 23 Journal of the Bar Association of Kansas 383, at the bottom of page 384, at the conclusion of a discussion of all of the cases included herein, the Editor says:

> "A pattern for decision in relation to the fluoridation question has been established by these able state courts. It may now safely be said that cities do have the police power to establish fluoridation in city water supplies if they desire to exercise it."

At most, these Law Review Articles are opinions of students and professors and are in no way decisive or controlling. The most that can be said for them is that the question is one of wide public interest. However, no great body of opinion or evidence has yet been adduced which has not been properly brought before this Court in the cases which preceded the one at bar.

CONCLUSION.

Appellees have failed to find an issue presented by appellant which is of a substantial character or a proposition of law in conflict with the decision of this Court in the *Jacobson* case. We submit, therefore, that the appeal of appellant should be dismissed.

Respectfully submitted,

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Attorneys for Appellees.

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BRIEF OF APPELLANT IN OPPOSITION TO APPELLEES' MOTION TO DISMISS.

WILLIAM J. KRAUS,
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BRIEF OF APPELLANT IN OPPOSITION TO APPELLEES' MOTION TO DISMISS.

We have carefully examined the arguments advanced on behalf of appellees in support of their motion to dismiss the appeal. While no important or telling points have been made, nevertheless a few comments may be in order.

I. THE JACOBSON CASE DOES NOT AUTHORIZE COMPULSORY FLUORIDATION OF PUBLIC DRINKING WATER.

A reading of appellees' brief would make it seem that fluoridation is exactly similar to vaccination, and that the case of *Jacobson vs. Massachusetts*, 197 U. S. 11 gives a legislative body unlimited authority to enact compulsory fluoridation legislation.

If one examines the *Jacobson* case, a great landmark in constitutional law, and the preservation of the rights of individual citizens, it is clear that the *Jacobson* case defines when the police power may invade the personal liberty of individuals. The case first recognizes rights of in-

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dividuals as being paramount and then explains, how, and under what limited circumstances, the state may interfere with these fundamental rights of free peoples. The facts of the *Jacobson* case were that an epidemic of smallpox was raging in the town. On the basis of preventing a disease that was contagious, malignant and infectious, during an emergency of an epidemic, and under a clear and present danger to the public, this Court sanctioned the invasion of personal liberty by quarantine for those who refused vaccination.

However, it must be emphasized that at no time did this Court say that the body of an individual could be invaded with serum or medicine against the will of the individual.

The basis of the *Jacobson* decision is well stated in this language in the opinion at p. 27:

> "Upon the principle of *self-defense*, of *paramount necessity*, a community has the right to protect itself against an **epidemic of disease which threatens the safety of its members.**" (Emphasis ours.)

And again at p. 29 this Court said:

> "* * * in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, **under the pressure of great dangers,** be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand." (Emphasis ours.)

Dental caries is not a disorder which is contagious, malignant or infectious within the language of the *Jacobson* case; nor does it constitute an emergency or "pressure of great danger" sufficient to warrant restraint of the liberty of individuals nor involuntary invasion of the

bodies of the citizens of Cleveland with compulsory medication.

It is thus clear that appellees have distorted the true intent and meaning of the *Jacobson* case.

II. THE FLUORIDATION ORDINANCE IS COMPULSORY MEDICATION AND THUS INVALID AS AN INVASION OF PERSONAL LIBERTY GUARANTEED BY THE CONSTITUTION.

Even appellees have not dared to argue that fluoridation is not "medication." How could they when a chemical substance is added to water and intended to enter the bodies of individuals and act on those bodies?

However, appellees for the first time argue that the ordinance providing for fluoridation is not "forced medication" because no person is compelled to use the water furnished by the city for drinking purposes, and the ordinance makes no such provision.

Appellees state that a person who does not desire to drink fluoridated water may purchase bottled water. It is unnecessary to compare the cost of "bottled water" to water furnished by the City. Needless to say that the cost of bottled water is prohibitive to many citizens of the City of Cleveland.

A similar argument was advanced during the French Revolution when the Queen of France said to the starving masses "If they can't eat bread, let them eat cake."

There is, of course, no other water supply system available to appellant, since the City of Cleveland is the only public agency which owns and maintains a water supply system in the City of Cleveland, Cuyahoga County, Ohio.

Therefore, in a modern community like Cleveland every person among 1,200,000 souls must necessarily de-

pend upon city water; and the failure to obtain city water could and does constitute a deprivation of liberty by compelling a person to undergo real hardship or a penalty for refusal to submit to medicated water.

Certainly, once a municipality undertakes to furnish water to a community it must do so for each individual without compelling such individual by reason of adulteration of the public water, to purchase bottled water or dig a well.

Thus, since fluoridation imposes a special and burdensome penalty on individuals who refuse to drink fluoridated water, it does constitute an invasion of the liberty of individuals as guaranteed by the Constitution.

III. FLUORIDATION IS AN EXPERIMENT—COMPETENT SCIENTISTS DISAGREE ON THE MERITS OF FLUORIDATION DENTALLY AND ITS POSSIBLE DANGERS TO HEALTH NON-DENTALLY—IT THUS VIOLATES CONSTITUTIONAL GUARANTIES.

Appellees infer in their brief that fluoridation is not an experiment and that there is complete agreement among scientists as to its merit dentally and its safety non-dentally.

The fact is quite the contrary. Competent scientists do disagree as to the dental merits of fluoridation and its dangers non-dentally.

This is proven by the transcript of testimony given before the Delaney Committee of Congress in 1952 when scientists from all over America appeared and testified. (In evidence as Plaintiff's Exhibit No. 6.) The Delaney Committee wrote a report which is also in evidence and contains the following significant statements:

"A minority view is held by a number of qualified scientists, who believe that the safety of this procedure (fluoridation) has not yet been sufficiently demonstrated. It is their position that the proponents of fluoridation are proceeding too rapidly in recommending that communities fluoridate their water supplies immediately."

(*Delaney Report* reprinted at p. 449 of the Record, Plaintiff's Exhibit, Number 5.)

"The committee is of the view that a sufficient number of unanswered questions concerning the safety of this program exists as to warrant a conservative attitude. The committee believes that if communities are to make a mistake in reaching a decision on whether to fluoridate their public drinking water, it is preferable to err on the side of caution."

(*Delaney Report* as reprinted at p. 458 of the Record, Plaintiff's Exhibit, Number 5.)

In addition, the agreed statement of facts, to which appellees agreed (Agreed Statement of Fact No. 15) states as follows:

"There is a difference of opinion in the United States as to the value of fluoridation in preventing and reducing dental caries in children and its effect on the health and well-being of the adult population; the introduction of inorganic fluoride chemicals to Cleveland city drinking water is a local experiment which it is anticipated will produce the result of lessened dental caries in children without any ill effects to the health of the people generally."

It is thus clear that fluoridation is an experiment—and is thus a violation of individual liberty and constitutional rights by compelling individuals to take part in an experiment without their express consent.

IV. APPELLEES AVOID THE GRAVE CONSTITUTIONAL QUESTIONS POSED BY APPELLANT.

Other than stating the two fundamental questions presented by appellant, appellees make no effort to answer them except to rely upon the authority of three state court decisions and the fact that this Court has on three occasions, twice on certiorari and once on appeal, refused to consider the validity of fluoridation on the merits. Appellant is not concerned with the three state court decisions other than to impress upon this Court the unique opportunity afforded by this appeal to inquire into *all* of the constitutional implications inherent in fluoridation. No one case of the three previous cases seeking admission to this Court raised *all* of the constitutional issues, nor seriously argued them. The decisions by three state courts out of 48 is certainly not controlling as to any question, let alone one as serious in its constitutional implications as fluoridation.

However, a number of courts and judges have in unequivocal language rejected fluoridation and denounced its serious invasion of individual liberty. Justice Hill of the Washington Supreme Court in the case of *Kaul vs. City of Chehalis,* 277 P. 2d 352, 45 Wash. 2d 616 (1954), in his dissenting opinion (the court split 5/4) said:

> "What the residents of Chehalis could not be compelled to do one by one, it is now sought to compel them to do *en masse*; a treatment to which they individually could not be compelled to submit is here sought to be applied by more subtle but no less compulsory means. This smacks more of the police state than of the police power." (277 P. 2d at 361.)

The Supreme Court of Ottawa has just held fluoridation of Toronto water invalid in this language:

> "I do not want to be understood as saying that a municipality entrusted with the duty of supplying whole-

some water could not do something to make the water more wholesome in the sense of being more beneficial to health *as water* but I think a municipality enters a different field when it proposes to add to pure and wholesome water something *for medicinal purposes* and the real purpose is not to make the water pure and wholesome. I do not think the Legislature intended that a municipality should be given power to prescribe medicinally for the health of its inhabitants by adding to the water supply anything such as fluoride for the purpose of improving the general health of the community."

The Corporation of the Village of Forest Hill v. The Municipality of Metropolitan Toronto (Dominion Law Report March 19, 1956) decided March 19, 1956—as yet unreported.

It would thus appear that while appellees are perfectly willing to gloss over and disregard the fundamental and serious constitutional questions inherent in fluoridation, yet some courts have found, recognized and dealt with these questions by finding fluoridation illegal and unconstitutional.

V. APPELLEES HAVE COMPLETELY AND STUDIOUSLY DISREGARDED THE CERTIFICATE OF CHIEF JUSTICE CARL V. WEYGANDT AS TO THE EXISTENCE OF A FEDERAL QUESTION.

Attached to appellant's Jurisdictional Statement is a certificate of Chief Justice Carl V. Weygandt of the Ohio Supreme Court that the Federal constitutional questions were raised by appellant and decided adversely to appellant by the Ohio Supreme Court. While not binding on this Court, nevertheless it does constitute a definite statement by the highest judicial officer in the state of Ohio, which should not be lightly disregarded.

VI. APPELLEES ADMIT THAT THE QUESTIONS RAISED BY APPELLANT ARE OF GREAT GENERAL AND PUBLIC INTEREST—WITH THIS APPELLANT AGREES.

In speaking of the many law review articles on fluoridation (p. 12 Appellees' Brief) appellees say: "The most that can be said for them (the law review articles) is that the question is one of wide interest."

With this statement appellant agrees, and on this ground urges the Court to consider this unusually important case on its merits, because it is obvious that all legal scholars do find the constitutional questions involved to be serious.

The proponents of fluoridation now claim 1,150 communities fluoridated with 23,000,000 people enjoying the benefits thereof. (New York Times, April 15, 1956.) Presumably their goal is complete fluoridation—taking in 160,000,000 people.

No case ever had a greater general and public interest!

CONCLUSION.

We have hesitated to belabor this Court with extensive and unduly lengthy briefs. Yet, we are mindful of our duty to adequately present and explain these serious questions which cry out for determination by the final tribunal of this land:

1. Can medical treatment be forced upon individuals without their consent?

2. May the water supply of a community be used as the vehicle for medical treatment?

We respectfully urge this Court to note jurisdiction in this case.

Respectfully submitted,

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